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No. 78-1604

In the Supreme Court of the United States

OCTOBER TERM, 1979

CENTRAL MACHINERY COMPANY, APPELLANT

v.

ARIZONA STATE TAX COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The opinion of the Supreme Court of Arizona (J.S. App. 7a-14a) is reported at 589 P.2d 426. The opinion of the Superior Court of Arizona (J.S. App. 4a-6a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on December 4, 1978. A petition for rehearing was denied on January 23, 1979 (Pet. App. 14a). Appellant's jurisdictional statement was filed

on April 19, 1979, and probable jurisdiction was noted on October 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

QUESTION PRESENTED

Whether a State may tax the on-reservation sale of farm machinery to an Indian tribe, on the ground that the seller is not licensed as a permanent "Indian trader" residing on the reservation.

STATEMENT

The appellant, Central Machinery Co., is a corporation chartered by, and doing business in, the State of Arizona.[1] In 1973 appellant's salesman entered into a contract to sell eleven John Deere tractors to Gila River Farms, an enterprise of the Gila River Indian tribe. The contract was executed on the Gila River Reservation and the tractors were delivered to Gila River Farms on the reservation. The total price, including the tax in dispute, was $100,137.26. Gila River Farms paid for the tractors by a check that was delivered to the appellant on the reservation.

The Gila River Indian tribe is a federally recognized tribe that is governed by a constitution adopted pursuant to 25 U.S.C. 476. It occupies a reservation in Arizona established under the Act of February 28, 1859, ch. 66, 11 Stat. 388, 401. Gila River Farms is an enterprise established by the tribal council, apparently for the purpose of farming tribally-owned lands on the reservation. Neither Gila River Farms nor the Gila River tribe is a party to this action.[2]

Appellee State of Arizona imposes a transaction privilege tax on the privilege of doing business in the State. The tax is computed as a percentage of the gross receipts of the taxable entity, which in this case is the Central Machinery Co. The transaction tax is assessed against the seller of goods, rather than the purchaser. In the case of the present transaction, the tax was itemized on the bill of sale as an element of the total purchase price paid to appellant by Gila River Farms. The amount of the tax, as measured by the gross receipts from the sale of the tractors, is stipulated to be $2,916.62. This amount was paid to the State under protest by the appellant, who then filed this action for a refund. It is stipulated that, if appellant is successful in this action, it will refund the $2,916.62 to the tribe.

Appellant is not licensed under 25 U.S.C. 261-264 and 25 C.F.R. Part 251 to engage in trade with Indians on reservations. However, the transaction was approved by the Bureau of Indian Affairs.

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[1] The facts recited in this brief have been stipulated by the parties (J.S. App. 7a-8a).

[2] The result in this case should be unaffected by the fact that the sale was made to a tribal enterprise rather than to the tribe itself. In *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 157 n.3 (1973), this Court stated that "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business."

Appellant sued for a refund in the State Superior Court and prevailed (J.S. App. 4a-6a). With one Justice dissenting (J.S. App. 10a-14a), the Arizona Supreme Court reversed (J.S. App. 7a-10a). In its view, *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), was not controlling because "Central Machinery is not an 'Indian trader', although it may on occasions do business with reservation Indians, even to the extent of going on the reservation to solicit business" (J.S. App. 9a).

ARGUMENT

The narrow question presented is whether this case is governed by *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965). The identical transaction privilege tax is involved, and here, as there, that tax is sought to be collected in respect of a sale by a non-Indian company to Indians on their reservation. The relevant difference, according to the State and the majority of the Arizona Supreme Court, is that Central Machinery, unlike Warren Trading Post, does not "reside" on the reservation and has not obtained a permanent "Indian trader's" license. The response made by appellant—and accepted by the Superior Court and by the dissenting Justice of the State Supreme Court—is that the same federal statutes and regulations apply here and that the failure of Central Machinery to obtain a license cannot change the result. In the words of Judge O'Connor (J.S. App. 6a; emphasis in original): "It is the *existence* of the federal laws

and accompanying regulations and not their *enforcement* which pre-empts the State's ability to tax the transaction in question."

We believe that short answer is both correct and sufficient. If we go beyond this simple submission, it is only out of abundance of caution.

A. Statutory Pre-Emption

1. On their face, the Indian Trader statutes, 25 U.S.C. 261-264, apply to the transaction in suit. The sales contract was executed on the reservation, delivery was effected there and payment was made there. In fact and in law, the sale occurred on the reservation. See *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 42-44 (1940); *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 328-329 (1944). All such sales are within the literal scope of the cited provisions. Indeed, Section 264 makes it an offense, subject to fine and forfeiture, "to introduce goods, or to trade" without a license "in the Indian country, or on any Indian reservation." These words embrace this case, as at least one court of appeals has expressly held. See *United States ex rel. Hornell* v. *One 1976 Chevrolet Station Wagon*, 585 F.2d 978 (10th Cir. 1978).

The suggestion that only resident and regular traders are subject to the federal statutes is unfounded. Implementing regulations expressly provide for the licensing of "itinerant peddlers," 25 C.F.R. 251.9(b), by definition non-residents. See 25 C.F.R. 252.3(i). To be sure, in practice, no "license" is issued for a single transaction. But that

merely reflects the custom of granting a license for a substantial period of continuous dealing. Obviously, a small Indian tribe will not have occasion to purchase expensive farm machinery with such frequency as to justify a resident licensed dealer. Yet, as one would expect, federal power to approve or disapprove such an important transaction exists, just as it does for the purchase of ordinary staples. See 25 U.S.C. 262, 263. Indeed, here, both the budget of the tribal enterprise providing for the purchase of the farm machinery, and the actual contract of sale, were approved by the Bureau of Indian Affairs.

2. Any doubt as to the reach of the Indian Trader statutes is dispelled if we notice their origin and purpose. They derive, with very little change, from the very earliest Indian Trade and Intercourse Acts, beginning in 1790. Significantly, the language of the first statutes makes it very clear that *all* substantial trade with Indians, wherever conducted, was subjected to federal regulation. Thus, the Act of July 22, 1790, ch. 33, Section 3, 1 Stat. 137, reached anyone who attempted "to trade with the Indian tribes, *or* be found in the Indian country" (emphasis added). See, also, Act of March 1, 1793, ch. 19, Section 3, 1 Stat. 329. The later geographic limitation to "Indian country," see Act of June 30, 1834, ch. 161, Sections 1-7, 4 Stat. 729-730, simply reminds us how quickly, east of the Mississippi, the Indian was confined to his diminished territory, now for the most part defined and set apart by treaty. Henceforth, that would be the only situs of serious Indian trade.

It may well be that the conditions of the time usually required the trader to establish himself for some period within Indian country to develop a profitable business. But, as early as 1834, "introduc[ing] goods" or "trad[ing]" within Indian country without a license were expressly prohibited, quite separately from "resid[ing] in the Indian country as a trader." Section 4, 4 Stat. 729. Nor is there any basis for reading the early statutes as exempting significant transactions by merchants who were not exclusively or primarily Indian traders. On the contrary, it seems clear the primary concern, then as now, was to limit the risk that the Indians would continue to become victims of "fraud and imposition" in commercial intercourse by controlling whoever did substantial trade with the tribes. See H.R. Rep. No. 474, 23d Cong., 1st Sess. 11 (1834). Whatever gave rise to such opportunities was subject to regulation.

From an early day, no permit was required of bona fide travellers merely passing through Indian areas who wished "to purchase, by exchange or otherwise, such articles as may be necessary for [their] subsistence." See Act of March 1, 1973, ch. 19, Section 3, 1 Stat. 329. So, also, it may have been thought impractical to monitor occasional isolated personal transactions, except in specifically prohibited commodities. *E.g.*, Act of June 30, 1834, ch. 161, Sections 7, 20, 4 Stat. 730, 732. The focus was on commercial business. But it is not conceivable that those who wrote the Indian Trader provisions mean to exempt from their regulation a tribal purchase of essen-

tial farm machinery involving more than $100,000, simply because, in changed conditions, the negotiation of such a sale was possible without the "trader" establishing a permanent "post" in Indian country.

No doubt, such a transaction is more familiar today than it was in the early Nineteenth Century. Yet, as *Warren Trading Post* reminds us, there is still reason to "protect Indians against prices deemed unfair or unreasonable." 380 U.S. at 691. Today, moreover, there is an increased threat to Indian autonomy from State taxation, and effective protection of the tribes may more often require shielding them from burdens imposed by their governmental neighbors, rather than the greedy merchant. The exclusive federal control announced by the Indian Trader statutes serves that purpose as well. But, at all events, until Congress repeals them, these provisions should continue to be given "a sweep as broad as [their] language." *United States* v. *Price*, 383 U.S. 787, 801 (1966). Once again, it seems appropriate to paraphrase Mr. Justice Holmes, writing for the Court in *United States* v. *Mosley*, 238 U.S. 383, 388 (1915): "[I]f we cannot interpret the past by the present, we cannot allow the past so far to affect the present as to deprive [the Indians] of the United States of the general protection which on [their] face [the statutes] most reasonably afford[]."

3. If, as we submit, the transaction in suit is governed by the federal Indian Trader statutes, state regulation and taxation is clearly pre-empted. That follows from the provision in 25 U.S.C. 261 that "the sole power and authority to appoint traders to the

Indian tribes" shall reside in the Commissioner of Indian Affairs and the ruling in *Warren Trading Post* that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690 (footnote omitted). It cannot of course matter whether, as a consequence of general administrative practice or a particular default, the statutes have not in fact been enforced in a given instance. If Congress has preempted the field, the State cannot enter it—whether or not its action would actually conflict with the specific directive of a federal official. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 168 (1978); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

B. Constitutional Pre-Emption

What has been said, we believe, disposes of the case as a matter of statutory pre-emption under *Warren Trading Post*. But the same result follows, in our view, even if the federal Indian Trader statutes were deemed inapplicable here.[3] Our alternative submission is simply that, "*absent* governing Acts of Congress" permitting it (see *Williams* v. *Lee*, 358 U.S. 217, 220 (1959); emphasis added), the Indian Commerce Clause of the Constitution, of its own

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[3] Indeed, the Court has recently suggested that the holding of *Warren Trading Post* did not depend on the Indian Trader statutes. See *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170 n.6 (1973). The *Warren Trading Post* opinion itself expressly left open the constitutional question presented under the Indian Commerce Clause. 380 U.S. at 686.

force, pre-empts State regulation and taxation of trade with Indians on their reservation, at least in circumstances like those present here.

We appreciate that the doctrine of constitutional pre-emption in respect of State intervention in Indian affairs has been dormant for some years and, in some quarters, is thought to be beyond revival. Pervasive legislation by Congress has largely mooted the issue. See *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 n.8 (1973). But no provision of the Constitution becomes inoperative merely because it has not recently been called to service. Besides, as it seems to us, the Indian Commerce Clause has necessarily played a role in limiting State action in a number of recent Indian cases—albeit more modest reasons have been invoked.

1. It is hardly debatable, we suppose, that the Indian Commerce Clause—like the Interstate Commerce Clause—inhibits some State interference of its own force, independently of implementing congressional legislation. Sufficient, if extreme, examples are, on the one hand, a State law barring, or imposing a special duty on, the "importation" of Indian products from reservations within the State; or, on the other hand, a prohibition, or increased tax, on sales *to* reservation Indians. Even though they offended no specific provision of federal treaty or statute, such measures obviously must fall on the same ground as their interstate analogs. The real question here is whether the self-executing force of the Indian Commerce Clause reaches beyond discriminatory state legislation. We suggest it does.

2. No more than the Foreign Commerce Clause, the Indian Commerce Clause is not the exact counterpart of the Interstate Commerce Clause. Cf. *Japan Line, Ltd.* v. *County of Los Angeles*, No. 77-1378 (Apr. 30, 1979). Indeed, its purpose is, in many respects, very different. From the start, the Indian Commerce Clause was understood to authorize complete and absolute federal regulation of white-Indian relations of a kind and degree then unthinkable—and even now not entirely familiar—in respect of non-Indian commerce between the States. And, as the early Indian Trade and Intercourse Acts made clear, much of that regulation would be prohibitive or restrictive, and exclusive, in character—far from encouraging and facilitating the "free flow of commerce." See, *e.g.*, Act of March 1, 1793, ch. 19, Sections 6, 7, 1 Stat. 330; Act of June 30, 1834, ch. 161, Sections 3, 7, 20, 4 Stat. 729, 730, 732; 25 U.S.C. 263. But it was not only the power granted to Congress that was more pervasive and directed to a distinct goal; the Indian Commerce Clause, in its negative implications for State action, has a like scope. Indeed, in our view, the Clause reserved to the national government exclusive authority—absent delegation—to regulate intercourse with the Indian tribes, so long as they maintained their separate organization within their own territory.

That ought not be a surprising conclusion in respect of a matter that was then viewed as akin to foreign relations and one, like immigration, that was seen as primarily calling for restrictive regulation.

Cf. *Hines* v. *Davidowitz*, *supra*. We must remember that those who wrote the Indian Commerce Clause spoke of Indian "nations," with whom it was appropriate to execute treaties. As Chief Justice Marshall explained, that understanding is embodied in the Constitution through the Supremacy Clause which "adopted and sanctioned the previous treaties with the Indian nations." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). So, also, the separateness and quasi-alien character of Indians, even those residing within the boundaries of the States, was emphasized in their exclusion from the population base used to apportion Representatives. Art. I, Sec. 2, cl. 3. See, also, Amend. XIV, Sec. 2. But, as it happens, the specific history of the Indian Commerce Clause itself confirms its purpose to nationalize white-Indian relations and wholly to exclude State authority to regulate that intercourse.

Before the Constitution, there had been much vying between the States and the national Congress over authority to deal with the Indian tribes. The matter was ambiguously compromised in the Articles of Confederation, which, in Article IX, granted Congress "the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians," but then exempted Indians who were "members of any of the States" and purported to preserve "the legislative right of any State within its own limits." As Madison wrote in *The Federalist* No. 42, that was an "endeavor to accomplish impossibilities." He construed the new In-

dian Commerce Clause as resolving the dilemma by giving the national government exclusive authority over intercourse with the Indian tribes, whether within the States or elsewhere. *Ibid.* Although it was not always followed in practice, Madison's view, not surprisingly, has generally been accepted as sound constitutional doctrine.

Indeed, during the ensuing century, this Court expressly asserted that "there can be no divided authority" between federal and State governments in Indian affairs. *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1866). And, after rehearing the history of the Indian Commerce Clause as intentionally altering the scheme of the Articles of Confederation, the Court concluded that "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes." *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876). See, also, *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 417-418 (1865). Nor do we appreciate that the Court has retreated from that principle in more recent times.

3. No doubt, modern conditions counsel against reading the Indian Commerce Clause too expansively. With very limited exceptions, the negative implications of the Clause should be confined to reservations or other Indian country. Even there, activities which do not directly implicate the Indians are normally subject to State jurisdiction. *E.g.*, *United States* v. *McBratney*, 104 U.S. 621 (1881); *Utah & Northern Ry.* v. *Fisher*, 116 U.S. 28 (1885). And, of course,

we must respect any congressional decision to transfer or share previously exclusive federal authority with the State, whether by removing the protective reservation boundary, *e.g.*, *DeCoteau* v. *District Court*, 420 U.S. 425 (1975), or by direct cession of jurisdiction, *e.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979).

It may be, moreover, that certain transactions between individual Indians and their non-Indian neighbors are so unrelated to the goals of the Indian Commerce Clause that they can be made subject to modest State laws without offending the rule of exclusive federal regulation. See *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 481-483 (1976). But, absent congressional permission, the Indian Commerce Clause does not tolerate a State burden directly imposed on essential commerce with the tribe itself on its own reservation. That kind of transaction, we submit, remains within exclusive federal control and therefore beyond the State's power to reach.

3. Our submission is consistent with the modern cases recognizing the residual sovereignty of the tribes, including powers of self-government and limited territorial jurisdiction, *e.g.*, *Williams* v. *Lee*, *supra*; *United States* v. *Wheeler*, 435 U.S. 313 (1978), and preserving the personal immunity of reservation Indians from State taxation, *e.g.*, *McClanahan* v. *Arizona State Tax Commission*, *supra*; *Bryan* v. *Itasca County*, 426 U.S. 373 (1976). At the end of the day, those prerogatives survive as part of our constitutional arrangement and do not

depend on treaties or statutes confirming them. The historic fact is that, by subscribing to the Constitution, the original States—for themselves and all later admitted States—relinquished their claims to participate in Indian affairs, so long at least as the Indians remained within the territory confirmed to them by federal authority, and until Congress ordained otherwise.

That constitutional agreement governs this case. Here, however, there is no occasion to stray from the text of the Constitution. Both the personal immunity of Indians from State taxation, and the subsisting right of tribal self-government free of State interference, are no doubt reflected in the Indian Commerce Clause. But that provision merely assumes, without defining, the status of the Indian tribes as distinct political communities. The Clause itself does not circumscribe the residual autonomy of tribal governments or specify the scope of the exemption from taxation. Not so here. The Indian Commerce Clause speaks directly to the regulation of trade and intercourse between Indian tribes, within their territory, and their non-Indian neighbors. There is no ambiguity. At the least, we must read the Clause as wholly exempting from State burdens all substantial commerce with the tribes themselves in respect of articles that serve the vital interests of the reservation community.

4. The consequences of our argument, although important to the affected tribes, are very limited as they curtail State prerogatives. We do not of course

suggest that those who sell to Indians are, on that account, exempted from most State regulation and taxation. The Indian Commerce Clause, as we construe it, inhibits only burdens sought to be imposed directly on the Indian transaction, as is concededly the result here. Nor do we contend that every purchase by an individual Indian immunizes the seller from a transactional tax. We focus only on sales to the tribe itself, and only those which occur within reservation boundaries. And, finally, we invoke the Indian Commerce Clause as barring State regulation or taxation in respect of equipment to be used on the reservation in furtherance of the purposes for which it was originally set apart. There is, in this case, no arguable question of abusing a privilege, or of unduly extending a limited principle by resort to artificial devices. What is claimed is an immunity—running to the seller but given for the benefit of the tribe, on whom the economic consequences admittedly fall—in respect of Indian trade and intercourse in the most traditional sense. This much protection, we submit, the Indian Commerce Clause still affords today.

CONCLUSION

The judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted.

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